89-1633

Supreme Court, U.S.
FILED
APR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No._____

CECIL ARNOLD ODOM,
a/k/a Bud Kelly,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LUTHER C. WEST
18 East Eager Street
Baltimore, MD 21202
1-301-837-3120

Counsel of Record
for the Petitioner

QUESTION PRESENTED

Whether the United States District Court for the District of Maryland, and subsequently, the United States Court of Appeals for the Fourth Circuit, denied Petitioner his rights under the Double Jeopardy Clause of the United States Constitution, by ordering his retrial after the Petitioner was severed from an ongoing joint trial for conspiracy to murder a Federal witness by the trial court, at roughly the half way mark of his trial, in the absence of manifest necessity for his severance, but after a finding by the District Judge that a severance was manifestly necessary to protect the fair trial rights of Petitioner's co-accused, who was standing trial with him, and whom Petitioner contended was solely guilty of the crime charged, and whose trial was continued before the first jury, all over the vigorous objection of the Petitioner.

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a/k/a Bud Kelly,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

The petitioner, Cecil Arnold Odom, a/k/a Bud Kelly (and hereinafter referred to as "Odom"), respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit in this proceeding.

OPINIONS BELOW

The Slip Decisions of the Fourth Circuit have been reproduced and are set

forth herein in the Appendix. The initial decision of the Fourth Circuit is set forth at Appendix A-1 through A-58 (Judge Murnaghan's dissent is at A-28 through A-58). The Petitioner timely filed a Petition for Rehearing with a Suggestion for Rehearing En Banc to the Fourth Circuit, and the Court denied that Petition seven to four, with a Dissenting Opinion once again by Judge Murnaghan (and concurred in by three judges). The two decisions of the Fourth Circuit are contained herein in their entirety at Appendix A- 1 through A-74.

JURISDICTION

The decision of the Fourth Circuit affirming the action of the trial judge in severing Mr. Odom's case was issued on October 31, 1989. The Petition of petitioner for Rehearing and for A Suggestion for

Rehearing En Banc, was filed on November 10, 1989.[1]

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[1] The jurisdiction of the trial court over the offenses charged aainst Odom in the Superseding Indictment was invoked under the following Federal statutes: (1) as to Count I, Title 18 U.S.C. Sec. 1512(a)(1)(A), 1513, and 1515 (conspiracy to murder a prospective government witness to keep him from testifying in a forthcoming criminal trial in U.S. District Court, and to retaliate against the witness for providing information to the FBI relating to the commission of federal offenses); (2) as to Count II, 18 U.S.C. Secs. 1512 and 2, (tampering with a witness, i.e., murdering him to prevent his testimony as a government witness at a forthcoming criminal trial in U.S. District Court, and aiding and abetting therein); (3) as to Count III, Title 18 United States Code, Secs. 1513 and 2, (causing bodily injury to a prospective witness in a forthcoming criminal trial in U.S. District Court, i.e., murdering him, to prevent his attendance and testimony as a government witness at the trial, and aiding and abetting therein); (4) as to Count IV, 18 U.S.C. Secs. 924(c) and 2, (use of a firearm in a crime of violence against a prospective witness in a forthcoming criminal trial in United States District Court, for the purpose of preventing his attendance and testimony at that trial, and aiding and abetting therein); and (5) as to Count V, Title 18 U.S.C. Secs. 924(c) and 2 (use of a firearm in a crime of violence,

(Footnote Continued)

The opinion of the Fourth Circuit denying the Petition for Reconsideration and Rehearing En Banc was filed on January 24, 1989. The present Petition was filed within 90 days of that date and is therefore timely under Rule 13.1 of the Rules of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment V:

(Footnote Continued)
causing bodily injury to a prospective Federal witness in a forthcoming criminal trial in U.S. District Court, with intent to retaliate against such witness for providing information to law enforcement officers, and aiding and abetting therein, as charged in count III above).

" .... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ...."

STATEMENT OF THE CASE

The Statement of the Case will contain a background of the various legal actions that are necessary for an understanding of this case. The Statement of the Case will also set forth the legal positions of the two opposing sides of the Fourth Circuit decision on the central issue in this case, the former jeopardy issue, which is found, of course, in the majority decision of Judge Chapman and the dissenting opinion of Judge Murnaghan. In so far as possible, and in the interests of brevity, only the "bare bones" of the legal positions of Judges Chapman and Murnaghan will be set forth in the Statement of the Case, and the full legal precedents supporting those

positions will be set forth in the majority and minority decisions themselves, which are attached in their entirety in the Appendix.

The Majority Decision.

Judge Chapman, writing for the majority, noted that for "a proper understanding of this appeal, it is necessary to review the prosecutions that have resulted as a consequence of the murder of a federal witness (Leonas, or Leon), Vitkauskas, who was killed June 14, 1987." (A.4.) Judge Chapman further observed that Vitkauskas was to testify against Dale Joseph Benjamin, Sr. and his son, Dale Joseph Benjamin, Jr., in their trial for the theft of an armored car. An indictment was returned on February 25, 1988 charging Dale Joseph Benjamin, Sr., Victor Carroll Fincham, and Cleveland Everett Miller with conspiracy to

murder Mr. Vitkauskas, tampering with a witness, retaliating against an informant, using a firearm to tamper with a witness, and using a firearm to retaliate against an informant, all in violation of federal statutory law. (See note 1, supra, and A.4.) As Judge Chapman further noted at A.4, the present appellant, Cecil Arnold Odom, also known as Bud Kelly, was not indicted in the first action.

Quoting from Judge Chapman's majority opinion:

> Trial on the "first indictment began in May 1988. The prosecution contended that Benjamin and Fincham hired Miller to kill Vitkauskas to prevent him from testifying against Benjamin. During the trial, Benjamin elected to testify in his defense and Fincham then moved for a severance claiming that Benjamin's defense was antagonistic and prejudicial to his own defense. Judge Young conducted an evidentiary hearing on the motion to sever and found that Benjamin's defense "is completely antagonistic to and irreconcilable with Fincham's

> defense. If the jury believes Benjamin's story it must convict Fincham, similarly, if the jury believes Fincham's story, to which Benjamin refers in his defense, it must convict Benjamin." The trial judge further found that Benjamin's defense focused on Fincham's drug involvement and claimed that Fincham had Vitkauskas killed to prevent him from telling police about Fincham's drug dealings. The judge found that Benjamin was to testify that, as a result of a phone call he made to Fincham to advise him that Vitkauskas knew of Fincham's cocaine distribution ring, Fincham had Vitkauskas killed and set Benjamin up as "the fall guy." The court found that a severance of Fincham allowed Benjamin to present his complete defense without unfairly prejudicing Fincham's case.

(A.5, 6.)

The jury verdict in the first trial acquitted Benjamin and convicted Miller, who then elected to cooperate with the government. See Judge Chapman's opinion, A.6. Acting upon information supplied by Miller, the grand jury returned a superseding indictment charging Fincham and appellant Odom with conspiracy to murder.

Miller's testimony, according to Judge Chapman, was that Odom was fully involved in the planning of the murder and that Odom had in fact driven in the car with Miller and Vitauskas when Vitkauskas was taken on his last ride and murdered. Judge Chapman noted for the majority opinion, that according to Miller he was paid $500.00 for the murder and also had a cocaine debt forgiven as payment for killing Vitkauskas. (A.6, and 7).

Following the superseding indictment, as stated by Judge Chapman, Fincham moved for a severance in anticipation of unspecified antagonistic defenses, but the motion was denied, subject to reconsideration as the trial developed. See Chapman Opinion, A. 7. On the opening day of trial Judge Chapman noted that the district judge attempted to establish certain ground rules to govern the attorneys during opening

statements and examination and cross examination of witnesses. Judge Chapman noted that "In so doing he was attempting to prevent antagonistic and prejudicial information, such as prior firearm and narcotic dealings, from being brought into evidence by one defendant against the other." (A.7, 8.)

Judge Chapman noted further, that counsel for Odom was admonished several times concerning these rules, but Odom's attorney proceeded to attack Fincham "in his opening statement to the jury and in questioning the witnesses ... did everything possible to prejudice Fincham in the eyes of the jury." (A.8.) While intimating quite strongly that Mr. West's conduct was improper, Judge Chapman in writing for the majority ultimately admitted, however, that that "the conduct of Odom's attorney did

not amount to misconduct ... and we do not label it as misconduct." (A.23) [2]

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[2] In regard to the "conduct" or "misconduct" of Mr. West, Odom's counsel, Judge Murnaghan in dissent, viewed the conduct essentially as an "energetic presentation" of his client's defense. Judge Murnaghan, in n. 14, (A.50-52), observed first that Odom's counsel "had a duty to protect Odom's interests." He next quoted the trial judge's questions to the prosecutor immediately before the trial judge severed the cases, wherein the trial judge admitted that Mr. West was making a legitimate argument for the introduction of the evidence involved (that which led him to sever the two cases). Judge Murnaghan also noted that the trial judge found that Mr. West's comments to the jury in opening statement were not unfairly prejudicial to Mr. Fincham.

Judge Murnaghan also noted that while the trial judge stated that Mr. West's "hostile tone of attack" against Mr. Fincham, and the "personal venom" of his attack were involved in his decision, "he [the trial judge] expressed no disagreement with West's right to introduce the provocative evidence." Judge Murnaghan finished his comments in this regard by observing:

> There is a vast difference between actual 'misconduct' and an aggressive defense .... Energetic presentation of a client's case is hardly a proper basis for extinguishing the client's

(Footnote Continued)

It is also clear that the Fourth Circuit's decision (both by the majority and minority) that manifest necessity dictated a severance in the trial of Odom and Fincham, was a decision that was not based upon Odom's counsel's "misconduct," or that Fincham had been prejudiced by Odom's counsel's aggressive defense. As pointed out by Judge Murnaghan, and in the words of the trial court, it was not Odom's "finger pointing" at Fincham that caused him to sever the case. In the trial court's words, as quoted by Judge Murnaghan:

> It's not that which is causing me to reach this decision in this case. It's simply the accumulating problems I see in terms of evidentiary rulings and everything else which I think discretion is the better part of valor at this point, and seeing the problems down the road, it's sort of like when you go out to sea in a sailboat, the tide gets so high and waves get so

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(Footnote Continued)
constitutional right to be free from double jeopardy.

> high, no matter how much you want to get to the next port, you go back a little more conservative. I think that's the conclusion I have reached.

Footnote 8, A.37.

According to Judge Chapman's majority opinion, during the first two days of trial Fincham made unsuccessful motions for a severance, "but on the morning of the third day of trial the court found that a severance was necessary to protect Fincham." (A.8.) Judge Chapman's majority opinion noted that this, of course, presented the question of which defendant should be severed. Judge Chapman duly noted that Fincham asked to be severed, but Odom requested to be retained and that the trial proceed against him alone. (A.8.) The United States Attorney recommended that the case continue against Fincham because Fincham had been severed from the first trial and a second severance of Fincham on a charge as serious as the conspiracy to

commit murder would give the appearance to the public that Fincham "beat the system." A.9.

The trial judge accepted the government's recommendation. In doing so, the trial court specifically found that neither defendant (Fincham or Odom) had been prejudiced to that point in the procedure. The trial court further observed:

> As far as I am concerned, the matter of who to prosecute at what time generally properly lies within the discretion of the Executive Branch, and since I see no reason not to be guided by what they desire in this case, I am going to exercise my discretion to have the case proceed against Mr. Fincham. Thank you.

(A.37, n. 8)

As set forth in the margin, below, Judge Murnaghan in dissent observed that the government did not have the right to select which defendant to proceed to trial

with and which defendant to sever under these circumstances. [3]

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[3] Judge Murnaghan, in dissent, in n. 7(A.21), specifically found: "Prejudice is by no means absent from this record .... Indeed, the prejudice to Fincham caused by Odom's defense, while perhaps minimal, is undoubtedly an alternative, albeit unstated, reason for the government's preference for proceeding against him rather than Odom." Judge Murnaghan further observed in the last paragraph of the footnote, the fact that the trial judge chose to accept the government's recommendation to proceed against Fincham, because the trial judge felt "the dilemma was analogous to the initial prosecutorial decision made before jeopardy had attached ... is inapposite" to the situation where the trial was already underway, and jeopardy had already attached, as was the situation in the present case.

Judge Murnaghan wrote further that to permit the government to make the recommendation as to which defendant to proceed against <u>after jeopardy had attached and the trial was underway</u>, would permit the government to elect to proceed with the case which it felt was tactically more sound at that point, which, in Judge Murnaghan's opinion, the government obviously did in this case. (He noted that there was no question but that Odom's counsel's vigorous defense had considerably "softened up" Fincham.) Judge Murnaghan

(Footnote Continued)

Thus, the majority opinion in this case found a severance was necessary, i.e., a manifest necessity to protect Fincham's right to a fair trial (because of Odom's antagonistic defense which had threatened Fincham), and once severance was made for that purpose, there was no requirement for the trial court to find additional manifest necessity to sever Odom. The majority decision noted that in the "context of joint trials (which given the current reality of federal criminal law, are more often mass trials), the appropriate test is the trial judge's initial decision to stop the trial as it is then pending." Judge

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(Footnote Continued)
noted that tactical advantage of this sort is not "manifest necessity," as defined by the Supreme Court in prior case law, and that the Supreme Court in fact required the "strictest scrutiny" to assure that tactical advantage to the government played no part in a decision to abort or terminate a defendant's ongoing trial over his objection.

Chapman thus wrote for the majority: "The choice of whom to sever is a question of discretion, to be reviewed only for abuse, not by a second application of the extremely stringent manifest necessity test." (A.25, 26.)

Judge Murnaghan's Dissent.

Judge Murnaghan, writing in dissent, observed that under the Supreme Court's doctrine announced in Arizona v. Washington, 434 U.S. 497, at 505 (1978), "premature termination of an objecting defendant's trial bars subsequent retrial unless the government can demonstrate that the defendant's trial was terminated due to manifest necessity." (A.19.) In Judge Murnaghan's view the termination of Odom's trial, over his objection, coupled with the failure of the prosecutor to prove and the failure of the trial court to find manifest

necessity to sever Odom's trial, requires that the superseding indictment against him be dismissed on double jeopardy grounds. See generally, Judge Murnaghan's dissenting opinion, and page A.56.

Judge Murnaghan wrote in this regard:

> Once that contention is unraveled (i.e., the fact that the trial judge found he could sever either defendant following his finding that defendant Fincham could not get a fair trial in a joint trial with Odom) it stands revealed as an assertion not merely that <u>either</u> Odom or Fincham could be selected for continuance of his trial <u>(i.e</u>., discontinuance for the other) at the government's choice, but, indeed, as a statement that <u>both</u> Odom and Fincham would be forced to abort a trial already well underway as to which jeopardy had attached, and be required to start anew. The majority attempts a gymnastic feat in suggesting that, if this case had involved trial of a single defendant in Odom's circumstance, his double jeopardy claim would be well taken, but because the severance question had to be decided first and involved a choice of whom to sever, a mistrial for either Odom or Fincham, the court was free to exercise its discretion as to whom it would sever and whom continue. That ignores the fact that Fincham had

sought severance and for himself, therefore, of necessity, retrial, while Odom had vigorously insisted on his case continuing. It was not, I submit, an alternative open to the trial court to exercise its discretion as to which of the two defendants to sever (granting a mistrial) and whose case to continue on when one of the defendants asserting the double jeopardy provisions of the Constitution insisted on going forward and the other defendant was prepared to accept severance and mistrial. There simply was not a manifest necessity to sever and to choose Odom for severance, thereby declaring a mistrial in Odom's case. The Double Jeopardy Clause will have little meaning in multiple trials if the district court has the discretion simply to pick and choose and, in the course of doing so, ignore one defendant's insistence on being tried when there was a course open for the trial to continue on.

The problem with which we are faced, indeed, arises because Odom strongly protested against any severance which would result in the discontinuance of the case in progress against him, while Fincham sought just the opposite. Odom insisted on the trial's continuing against him alone. While a severance was manifestly necessary as long as there were the two defendants, discontinuing the portion constituting the already commenced trial of Odom was not manifestly necessary, if Fincham's trial were severed. The reason mandating a severance -- the mutually antagonistic defenses of Fincham and Odom -- did not mandate a preference

> over which defendant was to be severed. In other words, it may have been manifestly necessary to sever; it was not manifestly necessary to sever Odom.

(A.39-42.)

Odom's Immediate Appeal

Following Fincham's conviction Odom was called for retrial in November, 1989, and promptly filed a motion to bar his retrial on double jeopardy grounds. The motion was denied, the trial was suspended and Odom made an immediate appeal to the Fourth Circuit.

As noted, the Fourth Circuit affirmed the Trial Court's ruling on the issue of former jeopardy in a two to one decision, Judge Chapman writing the majority decision, and Judge Murnaghan writing a lengthy dissent. A Petition for Rehearing and a Suggestion for a Rehearing En Banc was filed by Odom's counsel, and this Petition

was denied on January 24, 1990, with seven judges opposed and four judges, including Judge Murnaghan, dissenting.

The issue of double jeopardy having been determined against him by the Fourth Circuit, Odom was brought to retrial in the District Court for the District of Maryland on April 2, 1990 and the trial, following his not guilty plea, terminated in his conviction on April 10, 1990. Odom, however, has not been sentenced in that case. Sentencing has been tentatively set for June, 1990, and an appeal from that conviction will unquestionably be filed with the Fourth Circuit following sentence.

The question of former jeopardy, however, having been resolved by the Fourth Circuit, will not be a part of that appeal. The present Writ of Certiorari, however, is timely filed to review the Fourth Circuit's

decision against Odom on the question of double jeopardy and to perfect Odom's valued rights in that regard, and moreover is seen (as will be discussed infra) as an issue of great public importance.

WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE

It is submitted that certiorari should be granted in this case because the Court of Appeals has rendered a decision in this case that has so far departed from the usual course of judicial proceedings on the matter of former jeopardy as to call for an exercise of this Court's power of supervision, as set forth in Rule 10.1(a) of the Supreme Court Rules.

It is clear that the majority decision in this case recognized the existence of Supreme Court guidelines in this case, and particularly that of Arizona v. Washington,

434 U.S. 497 (1978), which provides that premature termination of an objecting defendant's trial "bars subsequent retrials unless the government can demonstrate that defendant's trial was terminated due to manifest necessity." But it is also clear that the majority decision would not necessarily focus its requirements for manifest necessity upon the defendant to be severed in multiple defendant cases.

Turning directly to the mistrial or severance in Odom, it should be observed that the situation presented here is unique in former jeopardy cases. It is assumed that all parties to this case agree that Odom involves the application of double jeopardy standards to joint defendants, in mass trials (as opposed to a single defendant situation), and that the case poses a subject that this Court has never ruled upon. Judge Murnaghan made an interesting

observation in this regard, wherein he cautioned against judicial activism in applying traditional double jeopardy concepts to multiple defendant trials.

In footnote 15 of the decision involved here, Judge Murnaghan pointed out in regard to applying the rule to multiple defendant trials, that traditional concepts of constitutional jurisprudence (the "strict constructionist" view) would oppose adding to the language of the founding fathers in any way, but would take the Constitution as it is written with "no insertions or emnedations."

He further pointed out that strict constructionists apparently have not opposed adding the "manifest necessity" doctrine by <u>inference</u> to the constitutional clause "nor shall any person be subject for

the same offence to be twice put in jeopardy of life of limb," etc. Judge Murnaghan noted at this juncture, however, that he knew of no authority, outside of the present case, "for expanding the inferred term to read (in multiple defendant cases): '<u>except in a case of manifest necessity or the convenience of the prosecutor for the government</u>.'" Footnote 5, A.29, 31, emphasis added.

Thus, in a nutshell is Judge Murnaghan's argument: There is no authority, Supreme Court or otherwise, that would broaden the "manifest necessity" doctrine to include the trial court's consideration of the <u>convenience of the prosecution</u> as a major component of "manifest necessity." To do so would be to give a district court the absolute right to pick and choose among multiple defendants as to which defendant shall be severed, totally without regard to

a showing of traditional "manifest necessity" as a basis for the mistrial involved as to the defendant ultimately severed. [4]

For the trial court to consider the convenience of the prosecutor in its decision at to which defendant to sever in a multiple defendant trial, would, of course, permit the prosecutor to opt for the stronger case, and to store the remaining, less desirable, less stronger case, in deep freeze for a subsequent trial if ever

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[4] In this regard Judge Murnaghan noted specifically:

> The analysis must focus on Odom, the severed defendant -- it is his rights that are being tested, his constitutional safeguards that must be waived against the public interest in a complete prosecution, Thus, the inquiry must be whether, after severance was mandated, manifest necessity dictated that Odom be denied the right to have his trial completed before the original jury sworn. (A.43, 44.)

conditions should warrant retrial. This would give the prosecutor, as already pointed out by Judge Murnaghan, a heretofore unrecognized tactical advantage over defendants in a joint trial wherever manifest necessity dictated a severance.

It would furthermore permit a prosecutor to sever the ongoing trial of a multiple defendant, over his or her objection, after the government had learned the entire detail of that defendant's trial defense, and after reflection decided that the government could better prosecute that defendant in a subsequent single defendant trial situation -- which is the exact situation, it is submitted, that happened in Odom. It is submitted that a procedure of this nature totally robs the Double Jeopardy Clause of substance in regard to multiple defendant trials. Or, in Judge Murnaghan's words, the "Double Jeopardy

Clause will have little meaning in multiple trials if the district court has discretion [of this nature] simply to pick and choose and, in the course of doing so, ignore one defendant's insistence on being tried when there was a course open for the trial to continue on." (A.40, 41.)

The importance of the meaning of "manifest necessity" in former jeopardy situations, in multiple defendant cases, thus underlines the necessity of the Supreme Court review in this case. As noted, it is a subject upon which this Court has never ruled.

As pointed out by the Fourth Circuit majority, multiple defendant trials are going to be the order of the day in Federal criminal trials of the future. The majority decision in this case, would thus

in effect abolish the "stringent" test of proving manifest necessity for the severance of individual defendants in joint trials. Judge Murnaghan argues, passionately and persuasively, that this would be a wrong turn for courts to follow, and argues moreover that traditional, conventional constitutional concepts should focus directly upon the individual defendant selected for severance in multiple defendant cases. See, e.g., footnote 4, supra.

On the question of the exceptional importance of this case, it is submitted that all parties agree that this is truly an important case to American jurisprudence, and that it has significant to the American people. Judge Murnaghan on the en banc petition to the Fourth Circuit argued that "the case involves an issue of not only exceptional importance, but constitutional importance as well. He cited autho-

rity, and argued that the Double Jeopardy concept is "one of the oldest ideas found in Western civilization" with its "roots running into Greek and Roman times;" and that the right of the people to be free of government terror in regard to try and try and try again criminal defendants, led our Constitution's framers "to forbid the government from placing one in double jeopardy." A.72, 73. Judge Murnaghan cautioned that "Odom's case, being novel insofar as American precedent is concerned, presents a material question which deserves ... consideration." A.74.

CONCLUSION

The question presented here is substantial and of great public significance. Inferior courts need this Court's guidance concerning the issue involved here. For

the foregoing reasons, the petition for certiorari should issue.

Respectfully,

Luther C. West

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1-301-837-3120
Counsel for Odom

AFFIDAVIT OF SERVICE

I certify that on the 19th day of April, 1990, three copies of the foregoing Writ of Certiorari and attached Appendix were mailed to the Office of the Solicitor General, Department of Justice, Washington, D.C., 20530, and one copy each to the United States Attorney for the District of Maryland, Breckenridge Wilcox, and to Barbara Sale, Esquire, Assistant United States Attorney, counsel for the United States. All copies were mailed in United States Mail, first class postage, with postage prepaid. I further affirm that all parties requiring to be served have been served.

Luther C. West

Counsel of record
for Cecil Arnold Odom

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5687

UNITED STATES OF AMERICA

Appellee

vs.

CECIL ARNOLD ODOM, a/k/a BUD KELLY

Appellant

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CR-88-62-JFM)

Argued: May 12, 1989 Decided: October 31 1989

Before MURNAGHAN and CHAPMAN, Circuit Judges, and SMALKIN, United States District Judge for the District of Maryland, sitting by designation.

Luther Charles West for Appellant. Barbara Slaymaker Sale, Assistant United States Attorney (Breckinridge L. Wilcox, United States Attorney, on brief) for Appellee

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Chapman, Circuit Judge:

This appeal presents an unusual former jeopardy question. Appellant and a codefendant, Victor Fincham, were tried for conspiracy to murder a government witness and aiding and abetting in the murder of a government witness. After two days of trial, it became obvious that appellant's attorney had adopted a plan of defense which included doing all in his power to attack codefendant Fincham and to persuade the jury by reference to past wrongful acts that Fincham was the "kingpin" in the killing and that appellant was merely "an underling." During these two days of trial, Fincham's attorney made several motions for a severance claiming that Fincham was being unduly prejudiced by the manner in which appellant's attorney was conducting appellant's defense. On the third day of trial, Judge Motz granted a

severance, over appellant's objection. The Judge elected to proceed with the trial against Fincham, who was convicted. The trial judge found that because he had granted a severance and not a mistrial, there was no requirement that there be a "manifest necessity" to discontinue the trial as required by Arizona v. Washington, 434 U.S. 497 (1978). The trial judge found "even if manifest necessity is the proper standard in such a case, there was manifest necessity here." We find that on the present facts the trial judge did not abuse his discretion in granting a severance. The trial judge had discretion as to which defendant to sever from the trial, and the judge did not abuse his discretion in severing the appellant rather than the co-defendant Fincham. We find no violation of appellant's protection against double jeopardy in requiring him to now stand trial.

I.

For a proper understanding of this appeal, it is necessary to review the prosecutions that have resulted as a consequence of the murder of a federal witness, (Leonas, or Leon) Vitkauskas, who was killed June 14, 1987. Vitkauskas was to testify against Dale Joseph Benjamin, Sr. and his son, Dale Joseph Benjamin, Jr. in their trial for the theft of an armored car. An indictment was returned on February 25, 1988 charging Dale Joseph Benjamin, Sr., Victor Carroll Fincham, and Cleveland Everett Miller with conspiracy to murder, tampering with a witness, retaliating against an informant, using a firearm to tamper with a witness, and using a firearm to retaliate against an informant. The present appellant, Cecil Arnold Odom, also known as Bud Kelly, was not indicted in the first action.

Trial on the first indictment began in May 1988. The prosecution contended that Benjamin and Fincham hired Miller to kill Vitkauskas to prevent him from testifying against Benjamin. During the trial, Benjamin elected to testify in his defense and Fincham then moved for a severance claiming that Benjamin's defense was antagonistic and prejudicial to his own defense. Judge Young conducted an evidentiary hearing on the motion to sever and found that Benjamin's defense "is completely antagonistic to and irreconcilable with Fincham's defense. If the jury believes Benjamin's story it must convict Fincham, similarly, if the jury believes Fincham's story, to which Benjamin refers in his defense, it must convict Benjamin." The trial judge further found that Benjamin's defense focused on Fincham's drug involvement and claimed that Fincham had Vitkauskas killed to prevent him from telling

police about Fincham's drug dealings. The judge found that Benjamin was to testify that, as a result of a phone call he made to Fincham to advise him that Vitkauskas knew of Fincham's cocaine distribution ring, Fincham had Vitkauskas killed and set Benjamin up as "the fall guy." The court found that a severance of Fincham allowed Benjamin to present his complete defense without unfairly prejudicing Fincham's case.

The jury verdict in the first trial acquitted Benjamin and convicted Miller, who then elected to cooperate with the government. Acting upon information supplied by Miller, the grand jury returned a superseding indictment charging Fincham and appellant Odom with conspiracy to murder. Miller's statement was that Odom was fully involved in the planning of the

murder and that Odom had ridden with Miller and Vitauskas when Vitkauskas was taken on his last ride. Miller also stated he was paid $500 of Odom's money and also had a cocaine debt forgiven as payment for killing Vitkauskas.

Following the superseding indictment, Fincham moved for a severance in anticipation of unspecified antagonistic defenses. Judge Motz held a hearing and denied the severance motion, but stated that it would be subject to reconsideration as the trial developed. On the opening day of trial the district judge attempted to establish certain ground rules to govern the attorneys during opening statements and examination and cross examination of witnesses. In so doing he was attempting to prevent antagonistic and prejudicial information, such as prior firearm and

narcotics dealings, from being brought into evidence by one defendant against the other. Counsel for Odom objected to these ground rules because he wished to present more evidence of Fincham's wrongdoings, and in his opening statement to the jury and in questioning the witnesses he did everything possible to prejudice Fincham in the eyes of the jury. The attorney was admonished on several occasions by the trial judge, but without success. Appellant's attorney refused to follow the ground rules established by the court and proceeded with his attack upon the codefendant Fincham. During the first two days of trial Fincham made unsuccessful motions for a severance, but on the morning of the third day of trial the court found that a severance was necessary to protect Fincham. This presented the question of which defendant should be severed. Fincham asked to be severed, but Odom asked to be retained and

that the trial proceed against him. The United States Attorney asked that the case continue against Fincham because Fincham had been severed from the first trial and a second severance of Fincham on a charge as serious as the conspiracy to commit murder would give the appearance to the public that Fincham "beat the system."

The trial judge granted the motion to sever appellant and proceeded with the trial of Fincham.

Shortly thereafter, Odom filed a motion to bar his retrial on double jeopardy grounds and a motion to prevent the government, in the event of a retrial, from using any evidence developed since the time of his previous trial. Both motions were denied and Odom appealed.

II.

Defendants Odom and Fincham were properly charged in the same indictment and scheduled for a joint trial. Federal Rule of Criminal Procedure 8 provides for joinder of defendants when they are alleged to have participated in the same act or series of acts constituting an offense. However, Federal Rule of Criminal Procedure 14 provides:

> Relief from Prejudicial Joinder.
> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made b6 the defendants which the government intends to introduce in evidence at the trial.

In United States v. Santoni, 585 F.2d 667, 673 (4th Cir.), we found that when defendants were improperly joined under Rule 8 severance was mandatory, but we stated: "On the other hand, if joinder was proper the trial court was permitted to exercise its discretion in determining whether or not to proceed with a joint trial." In United States v. Spitler, 800 F.2d 1267, 1272 (4th Cir. 1986), we pointed out that the facts of each case must be examined to determine whether sufficient prejudice exists to require a severance, but we stated: "Application of this standard ... is for the district court in the first instance, and reviewable here only for an abuse of discretion." In Spitler we also held that antagonistic defenses do not per se require severance, even when the defendants attempt to cast the blame on each other. However, on the present record we are convinced that the

trial judge did not abuse his discretion in granting a severance on the third day of trial.

In his order denying appellant's motion to dismiss the present indictment under the Double Jeopardy Clause the judge outlined the history of the prior trial, the return of the superseding indictment, and the events leading up to the granting of the severance as follows:

> Prior to trial, Fincham again moved for a severance based upon anticipated antagonistic defenses. This court denied the motion, subject to it being renewed during the course of the trial if it became apparent that Kelly's[1] defense was so antagonistic to Fincham's as to deprive the latter of a fair trial. In denying the motion, the court also established certain ground rules, designed to assure a

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[1] Appellant used the alias "Bud Kelly" and he was referred to more often as Kelly than by his given name Odom.

fair trial for both defendants, concerning the extent to which the Government could present evidence as to drug activities in which it alleged Fincham and Kelly were involved and the extent to which Kelly could present evidence of and refer to drug and other illegal activities in which he alleged that Fincham was involved. After the opening statement made by Luther West, the attorney for Kelly, Fincham renewed his motion for a severance. The court denied the motion at that time and several times thereafter when it was again renewed. However, on the morning of the third day or trial, the Court reconsidered its position and granted Fincham's severance motion. The catalyst for this ruling was an evidentiary question; Kelly wanted to elicit testimony concerning a prior firearms transaction which the Court concluded was admissible as part of Kelly's defense but was not properly admissible against Fincham. The context in which the ruling was made, however, was created by the general conduct of Kelly's defense. As the trial was unfolding, it became increasingly apparent that despite admonitions from the Court, Mr. West would not abide by the letter and the spirit of this Court's ground rules and that he believed that the defense of his client required him to be hostile in tone, as well as in substance, towards (sic) Fincham. Seeing the storm clouds gathering, this Court decided that a severance would have to be ordered.

Since the defendants were charged with conspiracy, they were properly joined. A joint trial of co-conspirators is preferable unless such a trial will generate conditions so prejudicial to one of the defendants as to deny him a fair trial. After the present trial began, it became obvious to the trial judge that throughout the trial he was going to be faced with a choice of either curtailing Odom's defense, which could prejudice Odom, or allowing Odom's attorney to continue his inflammatory attacks on Fincham. which would be prejudicial to Fincham.

The attack of attorney West upon the co-defendant Fincham was so unrelenting and prejudicial that Fincham could not have received a fair trial as a co-defendant and before the same jury as Odom. "The taking of an adversarial stance on the part of a co-defendant's counsel may generate trial

conditions so prejudicial to the defendant under multiple attack as to deny him a fair trial." United States v. DeVeau, 734 F.2d 1023. 1027 (5th Cir. 1984), cert denied sub nom, Drobny v. United States, 469 U.S. 1158 (1985). Odom's attorney's tactic was to bring out any information that was detrimental and prejudicial to Fincham without regard to whether such information was relevant to the charges contained in the indictment. The trial judge made a valiant effort to conduct a joint trial of co-conspirators without undue prejudice to either, but when he found that a fair trial was impossible with the defendants being tried together, he made proper use of his discretion and severed the appellant Odom for a later trial.

Although the severance motion was made by Fincham and opposed by Odom, the judge had the discretion to decide which

defendant should continue trial before the empaneled jury, and which defendant should wait for a subsequent trial. In United States v. Aquiar, 610 F.2d 1296, 1301 (5th Cir. 1980), the court stated" "In light of the principles of Arizona v. Washington, once a severance is found to be warranted by manifest necessity, the trial court has sound discretion over who is to be retained and who is to be saved."

Since Fincham had been severed in a prior trial arising out of the same alleged murder, it was not an abuse of discretion for the trial judge to consider the possible impact upon public opinion and public confidence in the courts that might result from a second severance of Fincham and a second delay of his trial.[2]

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[2] The Court offers no opinion as to
(Footnote Continued)

III.

We have decided that the trial judge was within his discretion in granting a severance of the co-defendant and in deciding which of the two should be severed. We now come to the question of whether appellant Odom may be required to stand trial before a new jury, or whether such a trial is barred by the double jeopardy clause of the Fifth Amendment: "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...." A person is protected by this language from being subjected to the

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(Footnote Continued)
whether it might have been an abuse of discretion to proceed with Fincham's trial had he not been severed previously, as those were not the circumstances of the case now before us.

hazards of a trial and the possibility of conviction more than once for the same alleged offense. It is twice being placed in jeopardy that triggers the protection and not being twice convicted or twice punished. However, not every second trial is prohibited.

The Supreme Court has not addressed the Double Jeopardy Clause as it relates to the retrial of a defendant who has been severed after jeopardy attached in a prior trial. However, the Court has provided substantial guidance to us in Arizona v. Washington, 434 U.S. 497 (1978), which involved a claim to double jeopardy protection after the granting of a mistrial at the request of the state because of prejudicial statements made by the defen-dant's attorney in his opening statement.

Washington was tried and convicted of murder but his conviction was reversed on appeal and he went to a second trial. After the jury was sworn and Washington was placed in jeopardy, his attorney made an opening statement in which he stated that prosecutorial misconduct during the first trial had necessitated a second trial. The prosecutor objected and requested a mistrial claiming that such was a "manifest necessity" to protect the public interest in a fair trial. The trial judge, after considering curative instructions to the jury and other alternative solutions, concluded that none would be adequate and he granted the prosecution's motion for a mistrial. Washington then claimed that another trial was barred by the Double Jeopardy Clause, but the Supreme Court did not agree and stated:

> Unlike the situation in which the trial has ended in an acquittal or

> conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges aga9inst the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

Id. at 505.

The court found that other decisions had used "evident necessity" and "imperious necessity" but that these phrases have the same meaning as "manifest necessity," and refer to a "high degree" of necessity. It is concluded that this level of necessity was difficult to define and

for this reason the trial judge's decision is accorded great deference. However, the reviewing court should satisfy itself that "the trial judge exercised 'sound discretion' in declaring a mistrial." Id. at 514.

> We are persuaded that, along with the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny, the difficulty which led to the mistrial in this case also falls in an area where the trial judge's determination is entitled to great respect.
>
> In this case the trial judge ordered a mistrial because the defendant's lawyer made improper and prejudicial remarks during his opening statement to the jury. Although respondent insists that evidence of prosecutorial misconduct was admissible as a matter of Arizona law, and therefore that the opening statement was proper, we regard this issue as foreclosed by respondent's failure to proffer any Arizona precedent supportive of his contention and by the state court's interpretation of its own law, buttressed by the consistent opinion of the Federal District Court and the Court of Appeals. Cf. Bishop v. Wood, 426 U.S. 341, 346-347. We therefore start from the premise that defense counsel's comment was improper and may have affected the impartiality of the jury.

We recognize that the extent of the possible bias cannot be measured, and that the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, a mistrial is not "necessary." Nevertheless, the overriding interest in the even handed administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper remark.

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An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. In deed, such statements create a risk, often not present in the indivi-dual juror bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases he may discipline counsel, or even remove him from the trial, as he did in United States v. Dinitz, 424 U.S. 600. Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by

> a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his "duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop ... professional misconduct.

Id. at 510-513.

We recognize that the conduct of Odom's attorney did not amount to misconduct, as did that of Washington's attorney, and we do not label it as misconduct. However, it was designed to prejudice the codefendant Fincham by use of evidence, statements, and innuendos about his past illegal acts which might not be relevant to the present charge. The trial judge was familiar with the first indictment and trial, and he attempted to try co-defendants who had been properly joined, but in spite of his efforts he found that a fair trial for Fincham would be denied so long

as he was in a joint trial with Odom. His finding was entitled to the "special respect," and we find that the trial judge exercised the "sound discretion" required by Arizona v. Washington in concluding that the circumstances presented a situation of "manifest necessity" requiring a severance to insure a fair trial.

A defendant's right to have his trial completed before a particular jury is not absolute. As pointed out by Justice Black in Wade v. Hunter, 336 U.S. 684, 689 (1949): "[A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."

The dissent's analysis is unpersuasive because it reasons that the personal nature of the double jeopardy bar

requires application of the manifest necessity test to gauge the trial court's choice of which defendant among several or many to sever, given that there was plainly a manifest necessity to sever in the first place. Thus, the dissent advocates a two-tiered test, in which manifest necessity must be found to exist at both steps of the severance process. Applying the manifest necessity test in this fashion is inappropriate in light of the test's origin in the historical context of single-defendant trials. See discussion in Arizona v. Washington, 434 U.S. at 506-10 & nn. 18-27. In this historical context, the development of an individually focused test to fit the mistrial situation is both understandable and entirely appropriate. But, in the context of joint trials (which, given the current reality of federal criminal law, are more often mass trials), the appropriate place for application of the manifest

necessity test is the trial judge's initial decision to stop the trial as it is then proceeding. The choice of whom to sever is a question of discretion, to be reviewed only for abuse, not by a second application of the extremely strin-gent manifest necessity test.

In this way, the interest of society in achieving fair and just trials for all, see Wade v. Hunter, 336 U.S. at 689, will not be defeated by the mechanical application of a test rooted in historical antecedents insufficiently related to present realities to justify it in this context.

We conclude that the severance met the standard of manifest necessity and there was no abuse of discretion in proceeding with the trial of Fincham. Appellant Odom's protection against double

jeopardy will not be violated by requiring him to to to trial on the present superseding indictment. The necessity for the severance was, after all, created by the defensive tactics employed by appellant and his attorney.

IV.

We find no merit to appellant's claim that the government be denied the use of any evidence that may be developed after the date of the trial from which appellant was severed.

AFFIRMED.

MURNAGHAN, Circuit Judge, dissenting:

Because I believe the majority misconstrues both the factual background of this case and applicable constitutional law, I must respectfully dissent.

A terrible crime occurred in Maryland when a witness for the government in a federal criminal case was murdered. The government established to its own satisfaction sufficient grounds for seeking and obtaining indictment of two individuals, Cecil Odom, a/k/a Bud Kelly, and Victor Fincham for the crime. The cases seemed eminently ones for joinder, a conspiracy being charged and the two cases obviously having an overlap of factual material.[1]

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[1] F.R. Crim. P. 8(b) states:

(Footnote Continued)

However, after the case had gone to trial, with a jury impaneled and substantial testimony taken, certain aspects of the case as it developed became disturbing to the trial judge. The grounds for disturbance were not trivial. Odom's defense turned in a large degree into an attempt to show that the responsibility for the killing lay on Fincham's shoulders and not on his own. Fincham, on the other hand, took the position that he was not to blame. The prominence accorded during the trial to those conflicting versions concerned the court over whether a fair trial could be insured to Odom and Fincham if

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(Footnote Continued)

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

trial continued. Fincham heightened the problem by seeking a severance of his case,[2] while Odom strenuously objected to a severance.

Deciding that severance was the best course to pursue, the district court heard argument as to which defendant was to be severed. That would determine whose trial would proceed and whose would be deferred to a later date. For once unanimous, the defendants both urged that Fincham be severed, with the trial proceeding as to Odom. It appears that the

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[2] F.R. Crim. P. 14 provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

federal government, although it is clear that it felt that it had a viable case against either Odom or Fincham,[3] preferred to continue against Fincham and defer as to Odom since Fincham had already earlier secured a mistrial in a prior case involving charges of murder of the same federal witness, and the government was concerned about the effect on the public created if Fincham, a second time, should escape, for the time being at least, the hoped for consequences envisaged by the federal government.

The district judge, apprised of the government's preference and the reasons underlying it, was influenced by what appeared to be justifiable concerns so he

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[3] Otherwise why were the two cases brought to trial in the first place?

severed out Odom despite his objections, based on the aforementioned potential bad publicity if Fincham's trial were postponed. The trial against Fincham then proceeded. That ended in Fincham's conviction. Odom now attempts to raise a double jeopardy bar to his retrial.

The legal question presented here is really quite simple. The jury had been sworn and jeopardy had attached to Odom. As the Supreme Court made clear in Arizona v. Washington, 434 U.S. 497 (1978), premature termination of an objecting defendant's trial bars subsequent retrial unless the government can demonstrate that the defendant's trial was terminated due to manifest necessity. The question presented is thus simply whether manifest necessity existed to deprive Odom of his "valued right to have his trial completed by a

particular tribunal." Arizona, 434 U.S. at 505.

It does not seem open to serious question whether some severance should have been granted.[4] We may accept that it was manifestly necessary for a severance to occur if fair trials were to be assured. That, of course, necessitated separate trials for Fincham and Odom, a continuation before the same jury for one, and retrial for the other.

Manifest necessity to abort one part of the trial, Fincham's or Odom's, by severance undoubtedly existed, but

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[4] While requests for severance under Rule 14 "must be raised prior to trial," F.R. Crim. P. 12(b), Fincham had requested, but been refused, severance pre-trial and in any event the rule concerns a party's request for severance, not the district court's act to insure a fair trial.

establishment of that fact does not answer the question of whose trial, between them, should be aborted. It was not "necessary to discharge a jury before a trial is concluded." Arizona v. Washington, 434 U.S. at 505.[5] Severance would inevitably lead to mistrial and the consequent placing of the one severed on his retrial before a second jury. The trial against the other could and would proceed. Mistrial, however, would constitute double jeopardy in Odom's case[6] but it would not do so in Fincham's. Odom, in opposing severance, had insisted that his trial continue without interruption, but Fincham, unlike Odom, had requested severance, and consequently a mistrial. By that act, Fincham

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[5] The jury in fact remained in full operation. It carried on the trial of Fincham, ultimately convicting him.

[6] Creating a "manifest necessity" not to interrupt his trial.

consented to being retried. Because of Fincham's request, his retrial would not amount to double jeopardy. Oregon v. Kennedy. 456 U.S. 667, 672 (1982). Odom's would. With Fincham's severance, there would no longer be any manifest necessity to sever Odom. Fincham's retrial would not run up against the Double Jeopardy Clause. Odom's definitely would.

The trial judge found that no significant prejudice had occurred to either defendant thus far, [7] and specifically

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[7] Prejudice is by no means absent from this record, however. Indeed, the prejudice to Fincham caused by Odom's defense, while perhaps minimal, is undoubtedly an alternative, albeit unstated, reason for the government's preference for proceeding against him rather than Odom. The double jeopardy prohibition was designed to prevent the possibility of such governmental over-reaching for the purpose of securing a tactical advantage. Jeopardy spefici-
cally attaches before a judgment becomes
(Footnote Continued)

(Footnote Continued)
final , embracing the defendant's "valued right to have his trial completed by a particular tribunal, Arizona at 503, because

> [e]ven if the first trial is not completed a second prosecution may be grossly unfair. It imposes the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Id.

The district judge chose to accept the government's recommendation because he felt the dilemma was analogous to the initial prosecutorial decision made before jeopardy had attached. The analogy is inapposite. Here, the government is presented with two trials which have progressed to the midway point; it will obviously choose to proceed with the case that is tactically more sound, which it did. Whatever validity the allegations of policy as to trying Fincham first had, a review of the record reveals there is no question that he was "softened up" by Odom's counsel's vigorous defense.
(Footnote Continued)

found that he could see no legal reason to favor one over the other.[8] Odom, who had

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(Footnote Continued)
Tactical advantage is not manifest necessity. As the Supreme Court stated in Arizona, "the strictest scrutiny is appropriate when ... there is reason to believe that the prosecution is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." Arizona at 508.

[8] The trial court ruled that it was not Odom's "finger pointing" at Fincham that caused him to sever the case:

> Its not that which is causing me to reach this decision in this case. It's simply the accumulating problems I see in terms of evidentiary rulings and everything else which I think discretion is the better part of valor at this point, and seeing the problems down the road, it's sort of like when you go out to sea in a sailboat, the tide gets so high and the waves get so high, no matter how much you want to get to the next port, you just go back a little more conservative. I think that's the conclusion I have reached.
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> Now why am I going forward with Mr. Fincham? I think we can go forward against either of these defendants as far as I am concerned at this point. That would be my concern, specific concern. If I thought somebody had been unfairly prejudiced, I

(Footnote Continued)

fought severance throughout the trial, wished to be retained. Fincham, who had sought severance throughout the trial, wished to be the one severed. Ignoring their requests, the trial judge sought the government's recommendation, which unsurprisingly was the exact opposite of the individual defendants.' Asserting potential bad publicity stemming from the severance of Fincham in a second straight trial, the government pressed for his retention. The court acceded to the government request and severed Odom.

(Footnote Continued)
would say that that was the one who would have to be retried at a later date. I don't think that exist [sic] in this case.

As far as I am concerned, the matter of who to prosecute at what time generally properly lies within the discretion of the Executive Branch, and since I see no reason not to be guided by what they desire in this case, I am going to exercise my discretion to have the case proceed against Mr. Fincham. Thank you.

Once that contention is unraveled, it stands revealed as an assertion not merely that either Odom or Fincham could be selected for continuance of his trial (i.e., discontinuance for the other) at the government's choice, but, indeed, as a statement that both Odom and Fincham would be forced to abort a trial already well underway as to which jeopardy had attached, and be required to start anew. The majority attempts a gymnastic feat in suggesting that, if this case had involved trial of a single defendant in Odom's circumstanced, his double jeopardy claim would be well taken,[9] but because the severance question had to be decided first and involved a

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[9] Because there were multiple defendants (here two), the district court may promote the manifest necessity to sever to cover the lack of necessity to place Odom in double jeopardy. That, I suggest, avoids too lightly the clear constitutional prohibition of double jeopardy.

choice of whom to sever, a mistrial for either Odom or Fincham, the court was free to exercise its discretion as to whom it would sever and whom continue. That ignores the fact that Fincham had sought severance and for himself, therefore, of necessity, retrial, while Odom had vigorously insisted on his case continuing. It was not, I submit, an alternative open to the trial court to exercise its discretion as to which of the two defendants to sever (granting a mistrial) and whose case to continue on when one of the defendants asserting the double jeopardy provisions of the Constitution insisted on going forward and the other defendant was prepared to accept severance and mistrial. There simply was not a manifest necessity to sever and to choose Odom for severance, thereby declaring a mistrial in Odom's case. The Double Jeopardy Clause will have little meaning in multiple trials if the

district court has the discretion simply to pick and choose and, in the course of doing so, ignore one defendant's insistence on being tried when there was a course open for the trial to continue on.

The problem with which we are faced, indeed, arises because Odom strongly protested against any severance which would result in the discontinuance of the case in progress against him, while Fincham sought just the opposite. Odom insisted on the trial's continuing against him alone. While a severance was manifestly necessary as long as there were the two defendants, discontinuing the portion constituting the already commenced trial of Odom was not manifestly necessary, if Fincham's trial were severed. The reason mandating a severance -- the mutually antagonistic defenses of Fincham and Odom -- did not mandate a preference over which defendant

was to be severed. In other words, it may have been manifestly necessary to sever; it was not manifestly necessary to sever Odom.[10]

The majority's argument, in essence, is that "once a severance is found to be warranted by manifest necessity, the trial court has sound discretion over who is to be retained and who is to be severed." United States v. Aquiar, 610 F.2d 1296, 1301 (5th Cir.), cert. denied, 449 U.S. 827 (1980). In the majority's view, given

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[10] "In determining whether the trial judge exercised sound discretion in declaring a mistrial, we must consider whether there were less drastic alternatives to ending the trial. If less drastic alternatives were available, they should have been employed." United States v. Santori, 730 F. 2d 973, 975-76 (4th Cir. 1984). Many courts require that "[c]urative measures be resorted to before manifest necessity can be found." State v. Frazier, 79 Md. App. 118, 555 A.2d 1078, 1084 (1989).

manifest necessity to sever, the trial judge did not abuse his discretion to defer Odom's trial, and that for the majority is the majority is the end of the matter.[11]

The majority's rationale, however, is patently incorrect. A mere recital that a matter is within the discretion of the trial court does not immunize it from constitutional concerns. In this instance, manifest necessity may have existed to sever the trial, but that is not the critical stage for the present double jeopardy examination. The analysis must

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[11] The government cites to United States v. Rich, 589 F.2d 1025 (10th Cir. 1978), for the proposition that the trial judge's discretion is unaffected by whether the defendant seeks or acquiesces in the termination of the first trial. Rich, however is inapposite. In Rich a jury in a pending trial was discharged over the objection of the defendant Rich. In the absence of manifest necessity, the court found Rich's retrial barred by double jeopardy.

focus on Odom, the severed defendant -- it is his rights that are being tested, his constitutional safeguards that must be waived against the public interest in a complete prosecution. Thus, the inquiry must be whether, after severance was mandated, manifest necessity dictated that Odom be denied the right to have his trial completed before the original jury sworn.

If trial had proceeded against Odom, manifestly no prejudice would have attached to either defendant; one wished to be severed, one wished to be retained. In Fincham's case, discontinuance by severance as to him and subsequent retrial would not create the constitutional problem which confronts us in Odom's case as things have developed, for Fincham -- not Odom -- initiated the request for a severance. The request amounted to a motion for a mistrial as to Fincham and ended any basis, on

double jeopardy grounds, for asserting that he could not be retried. Oregon v. Kennedy, 456 U.S. 667, 672 (1982). Fincham and Odom, while disagreeing as to the need for a severance, were as one that, if there were a severance, the case should proceed against Odom. Odom was the one who had not sought severance, and the essence of the double jeopardy clause is that one, once put upon his or her trial, is entitled to continuation to conclusion by a finding of guilty or a finding of acquittal. Only if a retrial is necessary to avoid injustice to the one being tried may a trial be aborted and a subsequent retrial occur.[12] If Fincham were severed, trial could proceed without the threat of injustice which prompted severance in the first

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[12] Of course, if, as in Fincham's case, the criminal defendant has requested a mistrial, double jeopardy does not arise.

place. Retrial is only allowed in such circumstances

> where the mistrial was caused by the occurrence of an error which could not be cured during the remainder of the trial, and which could necessitate a reversal on appeal. Retrial is barred, however, where reasonable alternatives to mistrial are feasible and could cure the problem.

State v. Frazier, 79 Md. App. 118, 130-31, 555 A.2d 1078, 1085 (1989).

In the situation which we confront, there was, as indicated above, a paramount necessity for discontinuing the joint trial of Fincham and Odom. However, what had to be done upon a finding of manifest necessity to sever was not merely the granting of a mistrial to be followed by grant of a new trial trial to either party. Rather, it was a question of which party could be severed without triggering the law of double jeopardy. Here, Fincham

could not argue double jeopardy upon retrial. However, Odom most emphatically could do so, and has done, so.

I in no fashion with to denigrate the discretion of the trial judge. Absent constitutional imperative, his reasoning would certainly withstand our review.[13] Yet constitutional concerns must remain paramount. Indeed, the resulting impingement on the trial court's overall control of the severance process is minor. If both Odom and Fincham had sought mistrial, no problem under the double jeopardy clause would have been occasioned, whichever defendant's extant trial had continued on and whichever defendant's extant trial was deferred. If

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[13] Opting for the government's preference (hardly a constitutional imperative), the judge, however, disregarded the constitutional protection, so far as Odom was concerned, against double jeopardy.

neither Odom nor Fincham had sought a severance, with each insisting that his case continue, the present problem would also obviously not be before us. One "defendant's valued right to have his trial completed by a particular tribunal [would not] have to be subordinated to the public's interest in fair trials designed to end in just judgments." Wade v. Hunter, 336 U.S. 684, 689 (1949).

In this particular instance, however, the court's choice was mandated. There was no manifested need, only policy, perceived by it as good, underlying the decision to proceed against Fincham rather than Odom. Policy concerns do not trump constitutional rights. Fincham waived his rights by requesting severance. Absent any factor completely barring Fincham's retrial if severed, Odom's request to be retained must be honored. "If a defendant chooses

to stick it out to the sweet or bitter end, that is his choice. If the defendant desires a mistrial, he must manifest that desire by asking for it." Crutchfield v. State, 79 Md. App. 101, 108, 555 A. 2d 1070, 1073 (1989). As Fincham sought mistrial while Odom adamantly insisted on proceeding with a trial, choosing in effect "to stick it out to the sweet or bitter end," where he had obviously already been placed in jeopardy, the district court was required to accord to Odom his constitutional prerogative. In that posture, there was a manner of proceeding which could achieve both objectives, with no intrusion on constitutional rights, severance for Fincham who requested it, and proceeding on with the trial of Odom which had already commenced and which he adamantly insisted should proceed.

As stated, justification for the action of the district judge is asserted on the basis of United States v. Aquiar, 610 F.2d 1296 (5th Cir. 1980), which mandates that deference should be given to the action of the district judge in choosing whom to continue to try and whom to sever unless, of course, either defendant's rights would be infringed. However, severance, while not actively sought, was not objected to in Aquiar and in that state of things, apparently, the court perceived no such infringement. The lack of objection seemed to equate to acquiescence. Id. at 1301.[14]

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[14] Aquiar is distuingshable also since the person there asserting double jeopardy because of a severance to which she did not object was the tail wagging the dog as one of seven defendants, some arguably more culpable than she, the trying of six of whom would have to start entirely anew if her contention prevailed. Also, it was her intention to have her counsel

(Footnote Continued)

The critical consideration

(Footnote Continued)
criticize one defendant for exercising his constitutional right to remain silent, in contrast to her election to testify. Her failure to object to severance takes on added significance in light of those conditions.

Furthermore, the government in relying on Aguiar has sought to justify the choice of Odom to be severed, rather than Fincham, because Odom's counsel kept accentuating aspects of the case which gave rise to the justificable fear of prejudice to Fincham were the joint trial to proceed. But Odom's counsel had a duty to protect Odom's interests. The district judge before granting the severance observed in questions to the prosecution:

> Why doesn't Mr. West's (Odom's counsel) argument have some force? Why isn't that evidence from which one could reasonably argue that the phone call did not have the effect subscribed to it by at least the government? ... Why isn't what Mr. West is saying not right? Why isn't that legitimate argument for him to make?

The district judge also found that nothing in West's opening argument "was unfairly prejudicial as far as I am concerned in terms of the whole context of this case."

Even after severance of Odom had occurred and he was pressing a double

(Footnote Continued)

throughout, however, is that Odom did not acquiesce in severance while Fincham sought it. Indeed, Odom adamantly opposed it. He asked that the trial continue as to him. He now asserts that, for double jeopardy reasons, he no longer may be put to his trial a second time without there being a manifest violation of his constitutional rights. Although it is not a congenial task to foreclose the government's prosecution of a case where it at least thought it had a strong chance of securing a

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(Footnote Continued)
jeopardy objection against his retrial, while the district court did allude to West's hostile tone of attack "with a personal venom" against Fincham, he expressed no disagreement with West's right to introduce the provocative evidence.

There is a vast difference between actual "misconduct" and an aggressive defense, particularly when the choice of label carries constitutional significance. Energetic presentation of a client's case is hardly a proper basis for extinguishing the client's constitutional right to be free from double jeopardy.

conviction, nevertheless, such considera-rtions cannot rise to the same high level as, and contradict, the United States Constitution which provides in Amendment 5: "... nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb ...." [15] The federal government cannot prosecute Odom, against his will, for the crime or crimes for which he had been indicted and for which he had been put to his trial up to the point in this case of severance. The manifest necessity not

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[15] There are today some pundits not adverse to judicial utternances decrying any adding to the language of the founding fathers. They favor taking the Constitution as it is written with no insertions or emendations. But sucyh a strict construction is urged by no one here. Everyone agrees that after "nor shall any person" ion the amendment to the Constitution the phase "except in a case of manifest necessity" should be inferred. I know of no authority, however, for expanding the inferred term to read:"except in a case of manifest necessity or the convenience of the prosecutor for the government."

to continue his trial ended with the severance. By choosing to sever Odom and proceed with Fincham, the only mistrial granted in the case was of the defendant affected, Odom. It was by him repeatedly, even vehemently opposed.[16] The point is

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[16] It is vitally important to bear in mind that mistrial, for the purposes of the present double jeopardy analysis, was limited to Odom's case. To reiterate, the manifest necessity that he and Fincham not be tried together mandated severance but severance of Fincham was sufficient. It was error to sever Odom, who objected to severance vociferously. There would be no mainfest necessity in the case any longer, unless one recognizes manifest necessity to proceed with Odom's trial, once Fincham, who sought severance, was granted it.

The language in Arizona v. Washington, 434 U.S. 497, 505 (1978), is most instructive:

> Yet in view of the improtance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the

(Footnote Continued)

effectively and cogently summed up in Crutchfield:

> In summary, this case is one in which the trial judge, upon concluding that damaging statements should have been excluded, took it upon himself to declare a mistrial sua sponte in order to protect the rights of a defendant who did not seek or consent to that protection. There being nothing in the record indicating a manifest, i.e., palpable, evident, obvious, clear, plain, or patent, necessity for the trial judge to have aborted the trial, a retrial of appellant is barred by the Double Jeopardy Clause of the Fifth Amendment, which is made applicable to proceedings in State courts by the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969). It was error to deny appellant's motion to dismiss the indictment.

(Footnote Continued)
objection of the defendant.

Cf. United States v. Jorn, 400 U.S. 470 (1971).

Again, while the severance was manifestly necessary, the mistrial in the case of Odom was not.

Id. at 1074 (emphasis in original).[17]

Accordingly, I would reverse and remand with instructions that the indictment of Odom be dismissed on double jeopardy grounds.[18]

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[17] Though the opinions in Crutchfield and Frazier were handed down in early April 1989, over a month prior to argument in the case which concerns us, they were not briefed or argued. The fact that they are state court decisions on a federal constitutional law point should not render them inapplicable.

> In Etheridge, the Supreme Court of Virginia discussed the validity of the cap under the Federal Constitution and rejected some of the challenges raised here. While Etheridge is of course not binding upon us in these matters of federal law, we find its reasoning persuasive and we follow it in this case, adding only some additional comments.

Boyd v. Bulala, 877 F.2 1191, 1195-96 (4th Cir. 1989).

[18] The consequences may not be as
(Footnote Continued)

(Footnote Continued)
unfortunate as the government asserts, as Odom may still be liable under state law for any crimes committed. See United States v. Wheeler, 435 U.S. 313, 316-17 (1978).

It is all, in the end, too reminiscent of that childhood game of how to ferry three missionaries and three cannibals across a river in a boat holding only two passengers in such a way that cannibals are never in a majority. It all comes down to this. Imagine two individuals out for a walking trip together. The journey leads them through a pass in the mountains, part of which consists of a narrow gorge barely negotiable for two traveling side by side. A mountain slide, however, has brought down a large mass of rock and other debris, making it impossible for more than one to pass at the same time. Passing in Indian file would cause to arise the risk that a boulder dislodged by one might strike and cause the other to fall. Only proceeding alone or side by side would be safe. One of the hikers (Fincham) does not want to press on but prefers to wait at a nearby inn 'til next morning to continue the journey. The other (Odom) faces extreme time constraints requiring his presence at the destination as soon as possible and feels it necessary, manifestly necessary if you will, to carry on. There is, however, absolutely no manifest necessity to detain the traveler (Odom) feeling time's exigencies and, even if the companion (Fincham) was exhausted and found it manifestly necessary to stop, the man in a hurry should be , and no doubt would be,
(Footnote Continued)

(Footnote Continued)
the one to carry on through the debris choked gorge while his erstwhile companion is permitted to enjoy the good night's rest at the inn which he prefers.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-5687

United States of America,

Plaintiff-Appellee,

v.

Cecil Arnold Odom, a/k/a Bud Kelly,

Defendant-Appellant

On Petition for Rehearing With Suggestion For Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to the Court. In a

requested poll of the Court, Judges Phillips, Murnaghan, Sprouse, and Winter voted to rehear the case in banc; and Judges Ervin, Russell, Widener, Hall Chapman, Wilkinson, and Wilkins voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

CORRECTED ORDER

(Dissent attached)

As the panel considered the petition for rehearing and is of the opinion that it should be denied, with Judge Murnaghan dissenting,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge

Chapman. Judge Murnaghan dissents.

For the Court

_____

CLERK

MURNAGHAN, Circuit Judge, dissenting from denial of rehearing en banc:

The case of Odom is quite simple. He was charged with murder of a federal witness. So was Fincham. Consolidation was deemed an appropriate way to deal with the situation, and a jury was impaneled and testimony taken in the joint trial. Jeopardy consequently attached as to each. After three days of trial, the district court, while acknowledging Odom's right to assert the theory that Fincham had been responsible for the killing, nevertheless became concerned that a fair trial against Fincham might be compromised so long as the joint trial continued with Fincham bearing the brunt of the testimony. Odom remained adamant in asserting his constitutional right, once trial had started before a jury, to continue before that jury to the end. Fincham, on the

other hand, from a time prior to commencement of trial, moved for severance of his case.

Because the evidence that had been introduced only prejudiced Fincham, and was proper insofar as Odom was concerned, Fincham was the logically proper defendant for severance and retrial. Manifestly, by the same token, double jeopardy considerations came into play insofar as Odom, unprejudiced and demanding that his case be continued, was concerned. for Fincham no double jeopardy concerns arose since if his case was aborted he by his motion for severance and retrial waived any such concerns. [1] See United States v.

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[1] Of no little moment is the fact that, when the same scenario had evolved in the earlier joint trial of Fincham and someone named Benjamin, Judge Joseph Young in the United States District Court for the District of Maryland granted Fincham a severance (which he had sought) holding: "Severance of Fincham allows Benjamin to
(FOOTNOTE CONTINUED)

Dinitz, 424 U.S. 600, 608 (1976).

The district judge decided to grant Fincham's motion for severance but, nevertheless, continued Fincham's trial with the same jury, necessarily aborting the trial in progress of Odom. Let us suppose that, in granting Fincham's motion to sever, the district judge intended only to end prosecution in a joint trial, leaving to be decided which of the two defendants should be removed from the existing and already commenced case and which one's now single trial should continue on. [2] The propriety of a resulting grant of mistrial in Fincham's case should have been apparent.

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[1] FOOTNOTE CONTINUED
present his complete defense without unfairly prejudicing Fincham's case."

[2] It could, however, be argued that by granting Fincham's motion for severance (FOOTNOTE CONTINUED)

It is hornbook law that:

> Once a jury has been impaneled and sworn, jeopardy attaches, and unless manifest necessity for a mistrial is shown by the prosecutor, the Double Jeopardy Clause prohibits further prosecution.

Cantrell v. Kelley, No. 89-6621, slip op. at 4 (4th Cir.); Arizona v. Washington, 434 U.S. 497, 505 (1978). All viable alternatives must be unavailable. Harris v. Young, 607 F.2d 1081, 1085 (4th Cir. 1979), cert. denied, 444 U.S. 1025 (1980).

There was simply no manifest necessity for a mistrial in Odom's case, once the joinder for trial, a matter of judicial economy and prosecutorial convenience, had been done away with. In

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2 FOOTNOTE CONTINUED
the court necessarily aborted the case against him, so that, contrary to the district court's actions, Odom's case would necessarily be the one continued.

obedience to the Constitution, Odom's case should not have been discontinued and retried. Once the severance had occurred, it had to be Odom who went forward.

Since that seems to me pellucidly clear, the only other reason for a vote to deny rehearing en banc is a supposed lack of importance in the case.

But the necessity of maintaining uniformity counsels us to rehear Odom's case. Federal Rule of Appellate Procedure 35(a). The panel opinion concluded that as long as a manifest necessity for severance of defendants exists, the choice of which particular defendant is to receive a mistrial is not guided by necessity, rather the judge can choose, in his discretion, which defendant to sever. But the logical foundation in two previous Fourth Circuit cases seems to demand that a manifest necessity exist as to each

defendant who receives a mistrial. [3]

In both United States v. Chase, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907 (1967), and United States v. Smith, 390 F.2d 420, 422 (4th Cir. 1968), we were presented with the question of whether a defendant is placed in double jeopardy if retried after a mistrial, granted for the sake of a prejudiced codefendant and not for the sake of the defendant who desires to continue with the trial in progress. In Chase, the court first found that the district court correctly granted a mistrial as to two codefendants when a prejudicial newspaper

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[3] The panel's approach also conflicts somewhat with what we said in Harris v. Young, 607 F.2d 1081 (4th Cir. 1979), cert. denied, 444 U.S. 1025 (1980). In determining whether manifest necessity exists for declaring a mistrial, less drastic alternative must be considered. "If less drastic alternatives than a mistrial were available, they should have been employed in order to protect the (FOOTNOTE CONTINUED)

article was found in the jury room. 372 F.2d at 465. But the court also affirmed the declaration of a mistrial as to a third codefendant, Roy, who was being tried by the court not the jury. Judge Winter, who authored the opinion, stressed that it was necessary to declare a mistrial as to Roy, to protect the rights of the defendants already granted a mistrial in having a joint trial. Id. at 465-66. That made a mistrial of Roy, to keep him in tandem with the other defendants, manifestly necessary. [4]

The fact that some mistrial was manifestly

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[3] FOOTNOTE CONTINUED
defendant's interest in promptly ending the trial..." Id. at 1085. Here, of course, aborting Fincham's trial and continuing with Odom was a less drastic alternative.

[4] The recently decided United States v. Von Spivey, No. 89-5421 (4th Cir. 1990), went off on the same grounds, honoring a claim of the remaining defendants "that they would be prejudiced if the trial continued with the appellant representing himself." Slip. op. at 4.

necessary did not automatically imply that a mistrial as to each codefendant was manifestly necessary. See People v. Cooper, 111 Mich. App. 194, 314 N.W.2d 554, 556 (1981) (distinguishing Chase because that case's complexity made a continuation of joint trial necessary).

When the same double jeopardy issue was raised by another one of Chase's codefendants in the related case of Smith, the fact that the cases could not "be sufficiently distinguished from Roy's to justify disparate treatment" led to a similar refusal to find double jeopardy. 390 F.2d at 422. Not mentioned, but almost certainly present, was the consideration that one Fourth Circuit panel may not overrule another Fourth Circuit panel. Those considerations were not sufficient, however, to deter Judge Sobeloff from dissenting: "But not only was it no manifestly necessary to declare

a mistrial in Smith's case, it was not necessary at all or even judicious to do so." Id. at 424, 425 (emphasis in original).

In United States v. Alford, 516 F.2d 941 (5th Cir. 1975), the Fifth Circuit took the same position as Judge Sobeloff holding in a similar case that the double jeopardy clause barred retrial. "Mere judicial convenience in handling co-conspirators in the same trial has never been held to constitute an interest in the magnitude of a 'manifest necessity.'" Id. at 947[5] "There was no manifest necessity for the judge to declare a mistrial as to appellant Alford." Id. at 949. See also Thomas v.

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[5] That the rule is even more so in the case of prosecutorial convenience, see Judge Winter in Chase: "Moreover, there is not the slightest suggestion that the convenience or benefit of the government was sought to be served." 372 F.2d at 466.

Beasley, 491 F.2d 507, 509-10 (6th Cir.) (barring retrial on double jeopardy grounds because mistrial not necessary as to Beasley when granted as to three codefendants), cert. denied, 417 U.S. 955 (1974).

The entire debate seems to revolve around whether the need for a joint trial constitutes necessity for a mistrial as to one defendant when a codefendant is granted a mistrial. It seems understood that necessity must exist as to each defendant. In Odom's case, Judge Motz, had already precluded the possibility of a joint trial by granting a severance to Fincham. Hence, the joint trial reason is completely unavailable.

The case further involves an issue of not only exceptional importance, but constitutional importance as well. It centers on a by no means trivial matter. Odom stands indicted for murder. That is

not a congenial fact. It generates little sympathy for Odom. Yet, we should not allow such a deplorable crime to minimize the exceptional importance of punishment for that dread event in a proper and fair way.

That a defendant may not be twice placed in jeopardy is "one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times." Bartkus v. Illinois, 359 U.S. 212, 151-52 (1959) (Black, J., dissenting). Blackstone considered it a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offense." 4 W. Blackston, Commentaries 335. "Few principles have been more deeply rooted in the traditions and conscience of our people." Bartkus, 359 U.S. at 155 (Black, J., dissenting).

There was undoubtedly an important

not gone so far, requiring an autrefois acquit or autrefois convict, while in American constitutional law twice merely being put in jeopardy is forbidden. See C. Hampton Criminal Procedure 193 (3d ed. 1982); Archbold: Criminal Pleadings, Evidence & Practice § 4-94, at 361 (43rd ed. 1988). Odom's case, being novel insofar as American precedent is concerned, presents a material question which deserves en banc consideration.

I respectfully dissent from the denial of rehearing en banc. Judge Winter, Judge Phillips and Judge Sprouse join in this dissent from denial of en banc rehearing.

(2)

No. 89-1633

Supreme Court, U.S.
FILED
JUN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

CECIL ARNOLD ODOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, upon determining that it was manifestly necessary to discontinue a joint trial because one co-defendant, contrary to the court's directions, persisted in introducing matters prejudicial to another co-defendant without regard to their relevance, had discretion to decide which defendant's trial would continue before the empaneled jury and which defendant's case would be severed for trial before a different jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1633

CECIL ARNOLD ODOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 888 F.2d 1014. The opinion of the district court is reported at 724 F. Supp. 387.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1989. A petition for rehearing was denied on January 24, 1990. Pet. App. A59-A74; 895 F.2d 928. The petition for a writ of certiorari was filed on April 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted by a federal grand jury sitting in the District of Maryland and charged with murdering a federal witness, in violation of 18 U.S.C. 1512 and 1513, conspiring to murder a federal witness, in violation of 18 U.S.C. 1515, and using a firearm in a crime of violence, in violation of 18 U.S.C. 924(c). Petitioner and a co-defendant went to trial together, but during trial the court granted the co-defendant's motion for a severance from petitioner. Although petitioner wished to proceed with the trial and have his co-defendant retried before another jury, the court ordered a new trial for petitioner and allowed his co-defendant's trial to proceed with the existing jury. Petitioner subsequently moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion. 724 F. Supp. 387 (D. Md. 1988). Petitioner then took a pretrial appeal, and the court of appeals affirmed. Pet. App. A1-A58.

1. Leon Vitkauskas, a government witness, was murdered in June 1987. Vitkauskas had been scheduled to testify against Dale Benjamin, Sr., and Dale Benjamin, Jr., at their trial for theft of an armored car. In February 1988, Dale Benjamin, Sr., Victor Fincham, and Cleveland "Reds" Miller were indicted for conspiracy to murder and other crimes relating to the killing of Vitkauskas. Petitioner was not charged in that indictment. The prosecution contended that Benjamin and Fincham hired Miller to kill Vitkauskas. During the trial, Fincham moved for a severance on the ground that Benjamin's defense and his own were irreconcilably antagonistic and inconsistent. The district court granted Fincham's motion, severed Fincham's case, and proceeded with the trial of Benjamin and Miller. The jury acquitted Benjamin but convicted Miller. Pet. App. A4-A6.

Following his conviction, Miller elected to cooperate with the government. Miller told investigators that petitioner was

"fully involved" in the planning of the crime, that he paid Miller for carrying out the killing, and that he accompanied Miller on the victim's "last ride." Pet. App. A6-A7. In July 1988, the grand jury returned a superseding indictment charging Fincham and petitioner with various crimes, including murdering a federal witness and conspiring to murder a federal witness.

2. Prior to trial, Fincham moved for a severance in anticipation that he and petitioner would have antagonistic defenses. Fincham's motion was denied, subject to reconsideration as the trial developed. Pet. App. A7. The district court established "ground rules" to prevent prejudicial information from being introduced by one defendant against another. *Id.* at A7-A8. Although petitioner's counsel was admonished by the court on several occasions, he refused to abide by the ground rules. Instead, the "attorney's tactic was to bring out any information that was detrimental and prejudicial to Fincham without regard to whether such information was relevant to the charges contained in the indictment." [1] *Id.* at A15. Fincham renewed his motion for a severance after petitioner's opening statement, and on several occasions thereafter; on the morning of the third day of trial, the district court concluded that in light of petitioner's persistent attacks on Fincham, a severance was necessary to protect Fincham's right to a fair trial.

Both the government and petitioner opposed Fincham's severance motion. When the court granted the motion, petitioner and Fincham asked that Fincham's case be severed and petitioner's trial allowed to proceed before the im-

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[1] In his opening statement, petitioner's counsel disregarded the district court's prior ruling that evidence of illegal drug activity was inadmissible and told the jury that a bar owned by Fincham "was a hotbed of narcotics." Gov't C.A. Br. 6. Petitioner's counsel also sought to elicit testimony that a government witness had engaged in firearms dealings with Fincham. *Ibid.*

paneled jury. The government asked that Fincham's trial proceed in order to avoid a second mistrial in his case. The district court, reasoning that petitioner "should not * * * benefit from a situation which was of his own making," 724 F. Supp. at 389, ordered that petitioner's case be severed for trial before another jury, and proceeded with the trial of Fincham. The jury convicted Fincham.

3. The district court denied petitioner's motion to bar a second trial on double jeopardy grounds. 724 F. Supp. at 388. The court questioned whether the "manifest necessity" standard of *Arizona* v. *Washington*, 434 U.S. 497 (1978), applies where one co-defendant's case is severed. 724 F. Supp. at 389. In any event, the court held, it was manifestly necessary to discontinue the joint trial in this case. Petitioner's counsel had sought to "manipulate the trial process for the purpose of obtaining tactical advantage." *Ibid.* Counsel's tactics threatened to cause undue prejudice to petitioner's co-defendant and "made continuation of a joint trial clearly impossible." *Ibid.* The district court also rejected petitioner's motion to preclude the government from using any evidence that it had developed since the first trial. *Ibid.*

4. The court of appeals affirmed. The court recognized that "[t]he attack of [petitioner's attorney] upon the co-defendant Fincham was so unrelenting and prejudicial that Fincham could not have received a fair trial as a co-defendant and before the same jury as [petitioner]." Pet. App. A14. Accordingly, the court held that the district court acted within its discretion in granting a severance. *Id.* at A15.

The court of appeals further held that the court's decision to continue Fincham's trial and sever petitioner's case for retrial before a different jury was within its discretion and did not violate the Double Jeopardy Clause. The court observed that the trial court's choice between the two defendants, like the decision to grant a severance, "falls in

an area where the trial judge's determination is entitled to great respect." Pet. App. A21. The court of appeals rejected petitioner's argument that the Double Jeopardy Clause imposes a "two-tiered" manifest necessity test in multi-defendant trials. *Id.* at A25. The court observed that the manifest necessity test was developed in the context of single-defendant trials. In the context of joint trials, the court concluded, "the choice of whom to sever is a question of discretion, to be reviewed only for abuse, not by a second application of the extremely stringent manifest necessity test." *Id.* at A26.

The court then held that there was no abuse of discretion in this case. Although "the conduct of [petitioner's] attorney did not amount to misconduct," that lawyer's defense strategy was "designed to prejudice * * * Fincham by use of evidence, statements, and innuendos about his past * * *." Pet. App. A23. The court concluded that, where a severance is necessitated by tactics employed by a defendant's own lawyer, the district court has discretion to sever that defendant's case. *Id.* at A26-A27. The court summarily rejected petitioner's contention that the government should be precluded from using in petitioner's retrial any evidence developed since his first trial. *Id.* at A27.

Judge Murnaghan dissented. He agreed with the majority that "[i]t does not seem open to serious question whether some severance should have been granted," and he agreed that the situation "necessitated * * * a continuation before the same jury for one [defendant], and retrial for the other." Pet. App. A33. But Judge Murnaghan concluded that the district court had no discretion to sever petitioner's case, because only petitioner's co-defendant had moved for a severance and thereby consented to retrial before a second jury. Thus "it was not manifestly necessary to sever [petitioner]," and the Double Jeopardy Clause mandated severance of petitioner's co-defendant. Pet. App. A42.

Judge Murnaghan also filed an opinion dissenting from the denial of rehearing en banc. *Id.* at A62-A74.

Petitioner subsequently was tried and convicted, Pet. 21, but sentence has not yet been imposed. The petition in this case is from the court of appeals' ruling on the interlocutory appeal.

ARGUMENT

Petitioner contends (Pet. 22-30) that the manifest necessity standard applies not only to the district court's decision whether to grant a severance in the course of a multi-defendant trial, but also to the trial court's determination of which co-defendant's case to sever for trial before a different jury. The court of appeals correctly held that the second decision is reviewable only for abuse of discretion.

1. The double jeopardy principles that govern this case are summarized in *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978):

> Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor * * * must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

The Court recognized in *Washington* that the question whether prejudicial remarks by a defendant's lawyer require mistrial "falls in an area where the trial judge's determination is entitled to special respect" from reviewing courts. *Id.* at 510.

Petitioner does not dispute that it was manifestly necessary to discontinue the joint trial in this case. Nor does he deny that the need for a severance arose because his own counsel disregarded the district court's directions and injected into the trial information prejudicial to petitioner's co-defendant without regard to whether the information was relevant to the charges being tried. It thus is undisputed that petitioner's trial tactics made it impossible to continue the joint trial without prejudicing petitioner's co-defendant. See Pet. App. A15.

2. Petitioner nevertheless contends that it was not manifestly necessary to sever his case, and that the manifest necessity standard applies not only to the decision whether to grant a severance, but also to the determination as to which co-defendant's case to sever in a multi-defendant trial. This novel argument is without merit, for several reasons.

First, the rule petitioner proposes could lead to absurd results. In many cases it may be manifestly necessary to terminate a joint trial, but not manifestly necessary to terminate the trial of any particular defendant. If petitioner's view were adopted and the manifest necessity standard were applied to each individual defendant in such cases, an impossible situation would result: continuation of the joint trial would be prohibited, but retrial of any of the defendants would be barred by the Double Jeopardy Clause. At a minimum, adoption of petitioner's proposed rule would invite endless litigation over whether severance of one co-defendant's case was "more necessary" than severance of another co-defendant's case. See *Washington*, 434 U.S.

at 506 ("[C]ontrary to the teachings of Webster, we assume that there are degrees of necessity."). [2]

In addition, petitioner's suggested rule would create an incentive for co-defendants to engage in strategic behavior to defeat the rule that defendants may be charged and tried jointly "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). In this case, for example, petitioner adopted trial tactics that would have resulted in undue prejudice to his co-defendant, and then attempted to take advantage of that strategem by insisting that the court sever his co-defendant's case. Such tactics, even if they do not rise to the level of impropriety, should not be rewarded. Requiring the defendant to undergo a second trial in "th[e]se circumstances do[es] not * * * create unfairness to the accused." *Washington*, 434 U.S. at 505.

Finally, the determination to sever one co-defendant's case rather than another's, like the decision to grant a severance, "falls in an area where the trial judge's determination is entitled to special respect." *Washington*, 434 U.S. at 510. The district judge is in the best position to consider the various possibilities and weigh the relative harm to the co-defendants and the public interest. In this case, the district court took

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[2] Judge Murnaghan recognized this dilemma in his opinion dissenting from the panel decision below, but he did not suggest a solution, nor does petitioner. Judge Murnaghan stated simply that if both petitioner and his co-defendant had insisted that the trial continue, the "defendant's valued right to have his trial completed by a particular tribunal [would not] have to be subordinated to the public's interest in fair trials designed to end in just judgments." Pet. App. A48 (quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)). Judge Murnaghan did not explain how the manifest necessity standard would permit the severance of one defendant's case rather than another's in this situation, or indicate which defendant's wishes should be respected.

into consideration (1) that petitioner's counsel had "provoked" the mistrial and that petitioner should not "benefit from a situation which was of his own making"; (2) that neither defendant had yet been prejudiced by petitioner's trial tactics; and (3) that a second severance of Fincham's case might lead to a public perception that Fincham was "beating the system." 724 F. Supp. at 389. Such complex judgments call for the exercise of the trial court's sound discretion rather than the application of a rigid manifest necessity standard.[3]

3. Petitioner does not suggest that the courts of appeals are in conflict over the question presented. On the contrary, petitioner concedes that "the situation presented here is unique in former jeopardy cases." Pet. 23. Only one other court of appeals has considered the issue, and that was in a case in which the defendant did not move for a severance, but apparently did not object to the severance when it was granted. See *United States* v. *Aguiar*, 610 F.2d 1296 (5th Cir), cert. denied, 449 U.S. 827 (1980). The Fifth Circuit in that case agreed with the position taken by the Fourth Circuit in this case, holding that "[i]n light of the principles of *Arizona* v. *Washington*, once severance is found to be

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[3] We do not suggest that petitioner's expressed preference to be tried before the impaneled jury was irrelevant to the choice between petitioner and his co-defendant. Cf. *United States* v. *Dinitz*, 424 U.S. 600 (1976) (consent is relevant to the double jeopardy analysis). But where, as here, defense counsel chooses to employ tactics that necessitate a severance, the district court should have discretion to consider the public interest as well as the defendant's preferences. The fact that petitioner did not seek a severance "is simply one of many factors that properly entered the district court's decision." *United States* v. *Aguiar*, 610 F.2d 1296, 1301 (5th Cir.), cert. denied, 449 U.S. 827 (1980).

Petitioner is wrong in suggesting (Pet. 25) that the district court based its decision on the "convenience of the prosecution." The district court considered a variety of factors, including the government's expressed concern that a second mistrial in Fincham's case was not in the public interest. See 724 F. Supp. at 389.

warranted by manifest necessity, the trial court has sound discretion over who is to be retained and who is to be severed." 610 F.2d at 1301. Because the issue is not one that arises with any frequency, and because it has not provoked any disagreement among the courts of appeals or a conflict with any of this Court's decisions, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00947